Supreme Court, U.S.
FILED
APR 29 2005
OFFICE OF THE CLERK

No. 04-1315

IN THE

# Supreme Court of the United States

---

LONG ISLAND CARE AT HOME, LTD. AND
MARYANN OSBORNE,
*Petitioners,*

v.

EVELYN COKE,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## BRIEF OF *AMICUS CURIAE* HOME CARE ASSOCIATION OF NEW YORK STATE, INC.

---

JOHN LONGSTRETH *
PRESTON GATES ELLIS &
ROUVELAS MEEDS LLP
1735 New York Avenue, NW
Washington, DC 20006
(202) 628-1700

*Counsel for Amicus Home Care Association of New York, Inc.*

* Counsel of Record

April 29, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF *AMICUS* | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 5 |
| I. THE SECOND CIRCUIT'S DECISION CONTRAVENES ESTABLISHED PRINCIPLES OF ADMINISTRATIVE REVIEW AND AGENCY DEFERENCE, AND THUS IMPROPERLY SUBSTITUTES THE COURT'S OWN POLICY JUDGMENTS FOR THOSE OF CONGRESS AND THE AGENCY | 5 |
| A. The Rule Invalidated By The Second Circuit Is Fully Consistent With The Text Of The Statute And Its Legislative History | 5 |
| B. The Second Circuit Erred In Not Deferring To The Agency's Long-Standing Construction Of The Statute | 9 |
| II. THE SECOND CIRCUIT'S DECISION WILL CAUSE A MASSIVE DISRUPTION TO THE PROVISION OF AFFORDABLE HOME CARE SERVICES IN NEW YORK STATE | 15 |
| CONCLUSION | 20 |

# TABLE OF AUTHORITIES

CASES Page

*Alaska Department of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004) ..... 3, 7, 14
*American Postal Workers' Union v. USPS*, 707 F.2d 548 (D.C. Cir. 1983) ..... 11, 12
*Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir 2000) ..... 4, 11
*Barnhart v. Walton*, 535 U.S. 212 (2002) ..... 3, 7
*BedRoc Ltd. v. United States*, 541 U.S. 176 (2004) ..... 8
*Chevron U.S.A., Inc. v. National Res. Defense Council, Inc.*, 467 U.S. 837 (1984) ..... *passim*
*Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) ..... 7, 8
*Hartford Underwriters Ins. Co. v. Union Planters Bank,. N.A*, 530 U.S. 1 (2000) ..... 8
*Hibbs v. Winn*, 542 U.S. 88, 124 S. Ct. 2277 (2004) ..... 7
*Lamie v. United States Trustee*, 540 U.S. 526 (2004) ..... 8
*McCune v., Oregon Senior Services Div.*, 894 F.2d 1107 (9th Cir. 1990) ..... 17
*National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992) ..... 13
*North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) ..... 7
*Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985) ..... 8
*Pharmaceutical Research & Manufacturers of Am. v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004) ..... 12, 13
*United States Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005) ..... 11

TABLE OF AUTHORITIES—Continued

Page

*United States v. Mead Corp.*, 533 U.S. 218 (2001) ..... 3, 12, 13, 14

STATUTES AND RULES

29 U.S.C. § 213 (a)(15) ..... 5, 10
29 C.F.R. § 552.6 ..... 9
29 C.F.R. § 552.109 ..... *passim*
10 N.Y.C.R.R. § 400.23 ..... 18

LEGISLATIVE AND REGULATORY HISTORY

H. Conf. Rep. No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862 ..... 6
H.R. Rep No. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811 ..... 6
118 Cong. Rec. 24,715 (1972) ..... 9
40 Fed. Reg. 7404 (February 20, 1975) ..... 15
67 Fed. Reg. 16,668 (Apr. 8, 2002) ..... 15

OTHER AUTHORITIES

S. Greenhouse, *For Home Care Workers, A Fight for Pay, and Respect*, N.Y. Times, May 28, 2002, at B5. ..... 17
Michael S. Sparer, *Medicaid and the Limits of State Health Reform*, 110-111 (1996) ..... 19

IN THE

# Supreme Court of the United States

No. 04-1315

LONG ISLAND CARE AT HOME, LTD. AND
MARYANN OSBORNE,

*Petitioners,*

v.

EVELYN COKE,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF *AMICUS CURIAE* HOME CARE ASSOCIATION OF NEW YORK STATE, INC. [1]

## INTEREST OF *AMICUS* [2]

Amicus Home Care Association of New York State, Inc. ("HCA" or "Home Care Association") is a not-for-profit organization that promotes and supports high-quality, cost-

[1] *Amicus* certifies that this brief was authored in whole by counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No other person or entity made any monetary contribution to the preparation or submission of this brief.

[2] The written consents of the parties were requested and both parties have consented in writing to the filing of this brief. Copies of the written consents have been filed with the Clerk of the Court.

effective home care and community services for the citizens of New York State. The Association has approximately 250 members, most of which are non-profit and governmental home care provider agencies, and some of which are for-profit providers. HCA's members serve the majority of New York's Medicare and Medicaid beneficiaries receiving home care services, including 250,000 persons in New York City alone. HCA's President submitted a declaration in support of Petitioners' motion in the court of appeals for a stay of the mandate, which is included in the Appendix to the Petition for Certiorari ("Cert. Pet. App.") at pages 100a to 124a.[3]

The Second Circuit's decision imposes a devastating burden on the ability of HCA's provider members to provide high quality, affordable companionship services to elderly and infirm patients throughout New York State by invalidating a long-standing regulation of the United States Department of Labor ("DOL" or "agency"). That rule exempts home care companionship services from federal wage and overtime laws under the Fair Labor Standards Act ("FLSA"). It implements a statutory exemption that Congress enacted for the express purpose of making these domestic companionship services more widely available to those who need them, thus allowing them to avoid less desirable alternatives such as nursing home placement. The importance of the exemption in achieving these goals was recognized by the agency based on extensive rulemaking records it compiled when it promulgated the regulation in 1975 and when it determined in 2002 to retain it. The Second Circuit's decision ignored the extensive agency record, choosing instead to rule on the pleadings without consideration of any evidence as to the importance of the exemption to the hundreds of providers

---

[3] HCA and several other parties submitted *amicus* briefs in support of Petitioner's motion for rehearing and rehearing *en banc* in the court of appeals, but that court denied, without explanation, leave to file any of these briefs.

who have relied on it for thirty years to develop companionship services that have kept hundreds of thousands of people in their homes and communities.

The Home Care Association accordingly urges this Court to grant the Petition for Certiorari in order to eliminate the serious harms that invalidation of the rule creates for providers in New York State, and the uncertainties it creates for providers in other jurisdictions.

## SUMMARY OF ARGUMENT

The Second Circuit's decision ignores the sound policy reasons invoked by Congress and the agency in enacting and continuing the long-standing exemption for home companionship services, and misapplies this Court's precedent. Rejecting the views of every other court to have considered the matter, including the Tenth Circuit, the Second Circuit invalidated the regulation even though it was (a) the subject of two full rounds of notice and comment rulemaking, (b) in place for thirty years with the acquiescence of Congress, and (c) fully consistent with the language of the governing statute. The Second Circuit's decision thus conflicts with numerous decisions of this Court, including *United States v. Mead Corp.*, 533 U.S. 218 (2001) ("*Mead*"), which requires full deference to an agency decision issued after formal procedures such as notice and comment rulemaking; *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) and *Barnhart v. Walton*, 535 U.S. 212, 217 (2002), which grant "particular deference" to agency interpretations of "longstanding duration;" and *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* ("*Chevron*"), 467 U.S. 837 (1984), which requires courts to defer to reasonable agency constructions of statutes they are charged to administer. The Second Circuit's assertion that deference was not appropriate because the agency chose to label the regulation as an "interpretation" is likewise inconsistent with a host of sound precedents that reject mechanical invocations

of form over substance. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir 2000)(finding it "well-established" that the key question is not the agency's "labeling" of the rule, but whether the "interpretation" carries the "force and effect of law.")

The Second Circuit decision thus creates the very result that sound principles of administrative review are intended to avoid. It upsets a reasonable and longstanding agency rule, around which important and necessary health care arrangements have been made for decades, without any consideration of the harmful effects of its ruling. As set out in the agency's rulemaking record and in submissions to the Second Circuit by numerous affected parties, the exemption of domestic companionship services under the FLSA is critical to the quality of care. The budgets of the service providers represented by HCA are severely constrained and are dependent on government reimbursements, predominantly through Medicaid, that are themselves decreasing due to state budget constraints and significant lag times in reimbursement calculations. *See* Cert. Pet App. at 101a-102a. Unable to fund the significantly increased overtime payments the Second Circuit's ruling mandates, providers will be forced to staff home companion cases on shorter shifts, thus requiring more caregivers per case. *Id.* at 103a. This will have numerous negative effects, including reducing the continuity of care to recipients of home companionship services, increasing the time needed to train multiple caregivers on the same case, increasing supervisor visits as new aides are added to cases, and reducing wages and other compensation to home care workers who will no longer be offered the opportunity to work overtime hours. Providers will also be forced to seek additional workers at a time when staffing shortages already exist, and when new regulatory requirements are further limiting the availability of workers. *Id.*

The Second Circuit's decision creates a circuit split on an issue of great significance to the Home Care Association and others with an interest in the provision of home companion services, and will effect a massive disruption to the delicately balanced system that makes home care—a desired alternate to institutionalization—an affordable and safe option for tens of thousands of home care patients in New York State. It also ignores the plain language of the statute, is contrary to Congress' intent, and violates numerous principles of administrative review that counsel particular deference to the agency under the circumstances of this case. This Court should therefore grant the Petition for Certiorari so that it may review and reverse the decision.

## ARGUMENT

### I. THE SECOND CIRCUIT'S DECISION CONTRAVENES ESTABLISHED PRINCIPLES OF ADMINISTRATIVE REVIEW AND AGENCY DEFERENCE, AND THUS IMPROPERLY SUBSTITUTES THE COURT'S OWN POLICY JUDGMENTS FOR THOSE OF CONGRESS AND THE AGENCY.

#### A. The Rule Invalidated By The Second Circuit Is Fully Consistent With The Text Of The Statute And Its Legislative History.

The statutory exemption at issue, codified at 29 U.S.C. § 213 (a)(15), applies to

> any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary) . . .

This statutory language applies by its terms to any employee providing companionship services in domestic service employment. It does not exclude employees from the exemption merely because they are employed by third parties. Nor, indeed, is there *any* statutory language that makes *any* reference to third party employers. The descriptions of the provision in the legislative history are likewise broad and make no reference to any such limitation of the statutory exemption.[4]

As summarized above and set out in detail in the materials submitted in the appendix to the Petition for Certiorari, the Second Circuit's ruling will greatly disrupt the provision of home companionship services in New York (and other states governed by the ruling), and adversely affect the very health care workers the decision purportedly seeks to protect by reducing their opportunities for overtime and hence their overall compensation. Yet this ruling is not based on either the plain language of the statute or any direct evidence of Congressional intent from the legislative history. Instead, the Second Circuit purported to find a basis for its decision in the "context of the entire statutory and regulatory scheme," Cert.

---

[4] *See* H.R. Rep. No. 93-913, (1974) *reprinted in* 1974 U.S.C.C.A.N. 2811, 2821 (noting that "the provision does not apply to a person who, on an intermittent basis, provides baby sitting services, or who provides companion services."); *id.* at 2842 ("the bill exempts from both the minimum wage and overtime requirements, however, babysitters employed on a casual basis and employees employed in the capacity of companion to an individual who, by reason of older age or infirmity, necessitates a companion."); *id.* at 2845 ("the exemption reflects the intent of the committee to exclude from coverage babysitters for whom domestic service is a casual form of employment and companions for individuals who are unable because of age and infirmity to care for themselves."); H. Conf. Rep. No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862, 2865 ("The conference substitute retains the exemption for casual babysitters and companions contained in both bills and retains the overtime exemption for "live in" domestic employees.")

Pet. App. at 3a-4a, and in its assertion—again unsupported by anything in the Act's text or legislative history—that it is "implausible" Congress "would have wanted" any other result. *Id.* at 27a.

In concluding that it was "implausible" Congress "would have wanted" the rule, the Second Circuit side-stepped the undisputed fact that Congress has amended the Act *seven* times since the rule was promulgated in 1975, without disturbing the rule in any way.[5] Nor did the appeals court grant the agency's actions any appreciable deference, notwithstanding this Court's repeated admonitions that long-standing agency interpretations are to be given "particular deference." *See, e.g., Alaska Department of Environmental Conservation v. EPA*, 540 U.S. at 487 (quoting *Barnhart v. Walton*, 535 U.S. at 220, and *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n.12 (1982)). Instead, the court of appeals simply substituted its own view of Congress' purpose for that of the agency.

This Court has repeatedly held that the best evidence of Congressional intent is the words of the statute Congress enacted, not a court's own notion of what is or is not "plausible." "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality*

---

[5] "It merits emphasis, however, that prolonged congressional silence in response to a settled interpretation of a federal statute provides powerful support for maintaining the status quo. In statutory matters, judicial restraint strongly counsels waiting for Congress to take the initiative in modifying rules on which judges and litigants have relied." *Hibbs v. Winn*, 542 U.S. 88, 124 S. Ct. 2277, 2292 (2004) (Stevens, J., concurring). Rather than give any weight to this familiar principle, the Second Circuit suggested that it somehow loses force if the entire statute is not reenacted, a non-sequiter for which the court offered no support. *See* Pet. Cert. App. 21a n.5.

*Mgmt. Dist.* 541 U.S. 246, 252 (2004)(quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). *See BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'"). "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004)(quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*, 530 U.S. 1 (2000)). *See also Chevron*, 467 U.S. at 845 (when Congress has not directly spoken to preclude an agency's policy choice, a court may not overturn agency action based on "its view the concept is 'inappropriate' in the general context").

The Second Circuit's discussion of "Congressional purpose" does not refer to the statutory language or legislative history at all, choosing instead to rely on the law "before the 1974 amendments" and on a single law review article. *See* Cert. Pet. App. at 26a-27a.[6] However, as this Court has noted, "[t]he starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes." *Lamie*, 540 U.S. at 534 (citation omitted). The statutory exemption contains no limitation denying the exemption for companionship services simply because the patient or his family prefers to use a third party provider.

The Second Circuit also ignored relevant legislative history that expressly recognizes the need to allow elderly and infirm individuals to remain in their own homes rather than being

---

[6] Although in a later portion of the opinion the Second Circuit chided the agency for supposedly ignoring the "plain language of the statute," the language to which it referred was *not* the language of the statutory exemption, but rather the language of an agency regulation that does not address the companionship exclusion. *See* Cert. Pet. App at 29a.

displaced to nursing homes. As noted in floor debate on the bill, compliance with federal wage and overtime requirements would "increase tremendously the cost of taking care of our older people, perhaps forc[ing] into nursing homes some of them who otherwise could be taken care of perfectly well in their own homes." 118 Cong. Rec. 24,715 (1972)(comments of Sen. Taft).[7] The rule invalidated by the Second Circuit is fully consistent with this purpose for the exemption.

In sum, the Second Circuit's discussion of Congress' supposed purpose was untethered to the actual language of the statutory exemption itself, or to any relevant legislative history of that provision. Indeed, far from precluding the agency's rule, both the statutory text and the legislative history support it, as neither suggests any limitation of the exemption based on whether the domestic companions are employed by the patient, the family, or a third party.

### B. The Second Circuit Erred In Not Deferring To The Agency's Long-Standing Construction Of The Statute.

Implicitly recognizing that neither the plain language of the statute nor any statement in the legislative history precluded the result the agency reached in the rule, the Second Circuit devoted much of its opinion to a discussion of the appropriate level of deference owed the agency. *See Chevron*, 467 U.S. at 842-43 & n.9 (deference to the agency is required if "Congress has not directly addressed the precise question at issue"). The Second Circuit acknowledged that "[a]ll courts that have considered § 552.109(a) have accorded it *Chevron* deference." Cert Pet. App. at 21a. Nonetheless, the Second Circuit held that *Chevron* deference was not appropriate, and then proceeded to give the agency's rule effectively no

---

[7] The Second Circuit did, by contrast, explicitly consider statements from the legislative history in its discussion of 29 C.F.R. § 552.6, and upheld that regulation. *See* Cert. Pet. App. at 14a-15a, 17a-18a.

deference at all. The Second Circuit's analysis on this point was erroneous and inconsistent with the precedents of this Court and the rulings of other courts.

The Second Circuit's determination that *Chevron* deference was not required was based on its findings that the rule was "interpretive," rather than legislative, and that the notice and comment procedure undertaken by the agency "was not required." Cert. Pet. App. at 24a. Both of these conclusions were wrong, as was the Second Circuit's illogical leap from them to the further conclusion that the use of notice and comment procedures should not confer *Chevron* deference under *Mead* if the notice and comment is undertaken voluntarily.

The Second Circuit's holding that the rule was "interpretive" was based on the agency's placement of the rule under the heading "Subpart B- Interpretations," and on the agency's supposedly "self-conscious" admission that the rule was not issued under the delegated authority of 29 U.S.C. § 213(a)(15). Cert. Pet. App. At 22a-23a. The Second Circuit conceded, however, that the rule 'grants rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do," *id.* at 22a, and that it "was promulgated following notice and comment procedures." *Id.* at 21a. Moreover, the effect of the rule is to define which employees providing companionship services are subject to the exemption—precisely the task that Congress delegated to the agency by statute. Other than its reliance on the agency's label, however, the Second Circuit did not explain why the rule defining companionship services should be considered legislative, while the rule exempting such services if provided in the home should be considered non-legislative. Indeed, under the Second Circuit's reasoning, the agency could have achieved full deference merely by relabeling the rule and adding a citation in the Federal Register.

The Second Circuit erred in relying on the agency's labeling of its rule, rather than on its substance and the actual circumstances of its issuance. Courts have made clear in a variety of contexts that the substance of an agency's rule governs, not its label. *See United States Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005), ("fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule"); *Appalachian Power* 208 F.3d at 1024 (it is "well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation;" question is whether the "interpretation" carries the "force and effect of law.") The Second Circuit was thus wrong to conclude that, because the rule was labeled "interpretive," the notice and comment procedures provided by the agency were gratuitous, and not required by law.

As noted above, the Second Circuit conceded that the rule affected substantive rights and obligations "as legislative regulations do." Cert. Pet. App. at 22a. Moreover, the binding nature of the rule is attested to by the Second Circuit's finding that its enforcement would preclude plaintiff's claims for minimum wage and overtime compensation, and the court of appeals' resulting need to declare that the rule "cannot be enforced." Cert. Pet. App. at 2a, 4a. The Second Circuit cited no authority supporting its conclusion that, under such circumstances, the rule was properly classified as "interpretive" and thus was not subject to notice and comment rulemaking.[8]

---

[8] The only case the Second Circuit cited on the point, *American Postal Workers' Union ("APWU") v. USPS*, 707 F.2d 548 (D.C. Cir. 1983), was decided before *Chevron* and did not deal with the question of deference at all. Unlike the present case, the rule at issue in *APWU* was *not* subjected to notice and comment rulemaking, and did not "fill in the gaps" because Congress had set out a detailed formula on the matter at issue rather than

In any event, even if there were a sound legal basis for the Second Circuit's conclusion that the agency's "self-conscious" labeling of the rule should be given effect, which there is not, the Second Circuit was simply wrong as a matter of fact in concluding that the agency did not issue the rule pursuant to the statutory authority it was expressly given by Congress to implement the companionship services exemption of the Act. As set forth in the Petition, at pages 17 to 21 & footnote 10, the agency has repeatedly and expressly maintained that it exercised its statutory authority in promulgating § 552.109(a).

The Second Circuit likewise offered no sound authority for its conclusion that *Mead* deference is inappropriate when notice and comment rulemaking is undertaken voluntarily, citing only a law review article that described the question as

---

expressly leaving the matter to agency rulemaking. *See APWU*, 707 F.2d at 559. Moreover, in *APWU*, the agency conceded it was not acting pursuant to statutory authority and was merely implementing a prior interpretation by the Comptroller General. Here, by contrast, the agency has expressly asserted that the rule "serves to 'define and delimit' the terms of the 'companionship services' exception under Congress' express delegation of authority," and provided full notice and comment. *See* Cert. Pet. App. at 66a. Moreover, even the case cited by the Second Circuit noted that "an agency's characterization of its own action is not conclusive," *APWU*, 707 F.2d at 559; yet as noted above, the Second Circuit relied on nothing else for its conclusion that the rule was interpretive and did not require notice and comment. The Second Circuit's reliance on the *APWU* case for this point is also inconsistent with later federal appellate precedent. *See, e.g., Pharmaceutical Research & Manufacturers of Am. v. Thompson*, ("*PRMA*"), 362 F.3d 817, 822 (D.C. Cir. 2004) ("Through this 'express delegation of specific interpretive authority,' *Mead*, 533 U.S. at 229, the Congress manifested its intent that the Secretary's determinations, based on interpretation of the relevant statutory provisions, should have the force of law. The Secretary's interpretations of the Medicaid Act are therefore entitled to *Chevron* deference.")

"within an area of uncertainty." Cert. Pet. App. at 25a & n.6.[9] *Mead* distinguished agency interpretations that result from considered determinations based on formal procedures, and that are intended to have precedential effect, from *ad hoc* determinations using informal procedures. *See, e.g., PRMA*, 362 F.3d at 822 n.5 (distinguishing the 10,000 to 15,000 *ad hoc* decisions per year, from 49 different offices, at issue in *Mead* from a uniform policy adopted through statutory interpretation that was entitled to *Chevron* deference). *Mead* does not suggest that the agency's use of formal procedures should be discounted merely because they are undertaken voluntarily.

The goal of the APA's notice and comment procedures is to "increase public participation and fairness in agency decisionmaking and to establish a mechanism by which an agency can improve its own information base." *National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan* 979 F.2d 227, 240 (D.C. Cir. 1992). That goal was met in this case when the agency, expressly charged by statute to define and delimit the scope of the domestic companionship exemption, increased public participation and improved its own information base through notice and comment rulemaking proceedings. The agency received substantial information as to the harms that would result if the exemption were applied to companionship services, and took this into account in its final rule. The resulting rule is fully deserving of *Chevron* deference under *Mead*.

Finally, the Second Circuit's suggestion that the agency's notice and comment procedures here were "idiosyncratic" and "insufficient" because the agency changed its mind

---

[9] Indeed, the court cited, but chose not to follow, another law review article concluding that an agency's use of notice and comment rulemaking procedures should offer it a "safe harbor" entitlement to *Chevron* deference under *Mead*.

during rulemaking is simply perverse. *See* Cert. Pet. App. at 24a. The point of public notice and comment procedures is that the agency can and should take the information it gains into account in a meaningful way. Rulemaking procedures would be empty exercises if an agency were not allowed to change its mind. As set out in the Petition, at page 20, footnote 11, as long as the agency identifies the matters at issue in its notice of rulemaking, which it indisputably did here, it is not required to set off a new round of rulemaking because it reaches a different result in the final rule from that it proposed. The notice of proposed rulemaking identifies the issues to be discussed; it does not compel a specific result.

In sum, the Second Circuit's analysis of the deference issue went seriously awry. Not only did it misapply *Chevron* and *Mead*, it ignored the substantial deference the agency's rule was due even under *Skidmore*, given that it had been in place without change for thirty years, and had been left undisturbed seven times by Congress. *See Alaska Department of Environmental Conservation*, 540 U.S. at 492-93 (affirming agency interpretation of "longstanding duration" under *Skidmore* because it was a "rational interpretation" of the statute.) The requirement of substantial deference to long-standing agency interpretations would be rendered meaningless if courts could, as occurred here, reject agency interpretations fully consistent with the statutory language by substituting their own views as to which Congressional purpose is most "plausible."

Unless corrected by this Court, the Second Circuit's erroneous deference analysis will apply to all APA cases in that circuit, and retain the potential to confuse courts in other circuits as well. The Petition thus raises an important question with respect to judicial review of the administrative construction of statutes generally, as well as presenting a matter of great importance to the many parties that have relied on the

specific agency rule that the Second Circuit improperly invalidated.

## II. THE SECOND CIRCUIT'S DECISION WILL CAUSE A MASSIVE DISRUPTION TO THE PROVISION OF AFFORDABLE HOME CARE SERVICES IN NEW YORK STATE.

The agency issued 29 C.F.R. § 552.109(a) based on an extensive rulemaking record compiled in 1974 and 1975, *see* 40 Fed. Reg. 7404 (February 20, 1975), and reaffirmed it after taking extensive comments on a proposed amendment to the rule in 2001. *See* 67 Fed. Reg. 16,668 (April 8, 2002) (withdrawing proposed amendment). The rulemaking records contained substantial evidence of the harms that would ensue if the statutory exemption were construed to exclude providers of companionship services employed by third parties, and the agency noted that including such employees in the exemption was fully consistent with the statutory language. *Id.*

The court of appeals' decision, by contrast, was made on the basis of virtually no record, and does not discuss or even acknowledge the adverse effects of its ruling on providers and recipients of companionship services. Instead, its ruling was made on the basis of the pleadings alone, which as the District Court recognized, "provide little factual background." Cert. Pet. App. at 37a. As noted in the Petition, at pages 13, 23-26, the Second Circuit thus reached its ruling without considering numerous facts relevant to the regulation's "power to persuade" under *Skidmore*.[10] Moreover, when a

---

[10] Respondent opposed Petitioner's motion for judgment on the pleadings before the district court, but did not, at least as far as the district court opinion discloses, itself move for judgment on the pleadings or for summary judgment. Thus, at no point in the proceedings was Petitioner on notice that it had to advance all factual arguments in support of the regulation or face entry of judgment against it.

wide spectrum of governmental, nonprofit, and for-profit providers, including HCA, the City of New York, the Home Care Counsel of New York City, Inc., the National Association for Home Care & Hospice, Inc., the New York State Association of Health Care Providers, Inc., and the Continuing Care Leadership Coalition, learned of the Second Circuit's decision, and moved to file *amicus* briefs in support of the Petition for Rehearing setting out the numerous deleterious consequences of that decision, their motions were denied without explanation.[11]

As HCA and other entities attempted to set out in their *amicus* briefs in support of rehearing, and did set out in the declarations and other material supporting Petitioner's motion for stay of the mandate (which was granted), the Second Circuit's decision will decrease the availability of high quality home companionship services. For example, HCA President Carol Rodat has averred that "the effect of the Panel's decision would be to burden third-party employers providing home companionship services, to the extent that they will be unable to continue providing quality, affordable companionship services to elderly and infirm patients throughout New York State." Declaration of Carol Rodat ¶ 3, Cert. Pet. App. at 101a.

As noted in Ms. Rodat's declaration, the HCA's provider members already face severely constrained budgets due to their reliance on government reimbursement, predominantly through Medicaid, which is calculated on historical rather than current health care costs, and to overall deceases in government spending over the last decade. *Id.* ¶¶ 4-6, Cert.

---

[11] *See* Court of Appeals Docket No. 03-7666-cv, Orders of January 10, 2005, noting denials "endorsed on motion." Plaintiff brought this action as a "test case" against a small provider with limited resources, and HCA and other entities severely affected by the court of appeals' decision were unaware of the appeal until after the panel's decision issued.

Pet. App. at 101a-102a.[12] Providers' inability to fund increased overtime will require them to staff cases on shorter shifts, using a limited pool of workers willing to work those shifts. This will likely lead to gaps in coverage and hurt continuity of care as patients must contend with increased turnover in caregivers. *Id.* ¶¶ 7-8, Cert. Pet. App. at 103a. Patients suffering from Alzheimer's Disease and other forms of dementia generally receive full time care, and benefit particularly from close interaction with familiar caregivers. Increased turnover among health care workers also increases the burden on skilled nurses required to supervise each worker serving a client, further taxing the resources of provider agencies.

Ms. Rodat's declaration also notes that "[m]any patients may be forced into nursing homes if home care providers can no longer assure adequate and safe services." *Id.* ¶ 8, Cert. Pet. App. at 103a. Such a result is directly contrary to Congress' intent in exempting companionship services from the minimum wage and overtime requirements of the Act. As noted by the Ninth Circuit in *McCune v. Oregon Senior Services Division*, 894 F.2d 1107, 1110 (9th Cir. 1990),

> there are also sound policy reasons for applying the exemption to companions as defined by the Secretary. We are informed that these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. We also note that many private individuals, who do not benefit from federal and state assistance, may also be forced to forego the option of receiving these services in their homes if the cost of the services increases. The only alternative for these individuals may be institutionalization.

---

[12] HCA has lobbied the State for increased funding to pay increased salaries for home care workers. *See* S. Greenhouse, *For Home Care Workers, A Fight for Pay, and Respect*, N.Y. Times, May 28, 2002, at B5.

The companionship exemption protects those who are disabled or chronically or acutely ill, as they can retain service for the hours needed with little, if any, disruption.

Recent developments further increase the pressures created by the Second Circuit's decision. This month, New York State implemented a requirement that all unlicensed personnel who have direct contact with patients in home care (and nursing homes) must be fingerprinted for a criminal history record check. *See* 10 N.Y.C.R.R. § 400.23. The new regulations also forbid the operator of a home care agency from hiring or using employees who have been convicted of certain crimes within the ten years prior to April 1, 2005. Employers may hire workers on a provisional basis while awaiting these background checks, but if they do so, the workers must be subject to random direct observation every week.

These requirements add new costs on providers and will exacerbate the shortage of home care workers, as the process is likely to take anywhere from 35 to 120 days or longer. Attrition will also increase as fewer home health care workers are given the opportunity to earn overtime. *See* Rodat Decl. ¶ 9, Cert. Pet. App. at 103a ("Limiting their hours will result in reduced wages as well as loss of benefits in certain situations, likely causing employee attrition and thus heightening the staffing shortage that already exists.")

The Second Circuit's decision will also harm those recipients of home companion services, and their families, who need those services provided in their homes, but who are unable or unwilling to act as the direct employer of the service provider. *See* Letter from Sen. Christopher S. Bond to Mr. Thomas M. Markey, dated July 26, 2001, Cert. Pet. App. at 120a-121a ("Many elderly do not care to be in this role, preferring the simplicity and reliability of using a third party who is in the business of supplying home care personnel. The reason for the proliferation of these companies is the sim-

plicity and reliability of service provided by them."). Many individuals are not physically or mentally able to engage in all the activities required to employ individuals directly to provide companionship services, including finding caregivers, confirming their qualifications and suitability, arranging to pay their wages and benefits, handling the required tax and other regulatory paperwork, and making sure that shifts are covered when the companion is sick or otherwise unavailable. Yet, under the Second Circuit's ruling, if those persons use a third party to handle these tasks they are now subject to dramatically increased costs through the application of federal wage and overtime laws. The agency has determined in the course of two extended rulemakings concerning 29 C.F.R. 552.109(a) that neither the statute nor sound policy require such a result.

In sum, the Second Circuit's ruling will create a massive and wholly unnecessary disruption to the system through which New York has provided important home care services for decades. In reliance on the agency's long-standing exemption of home companionship services from the Act, whether or not those services are provided by third party employers, and on Congress' long-standing refusal to upset this rule, New York has developed an effective network through which county social service agencies administer and supervise government-funded personal care programs, and under which Medicaid home care recipients are, with limited exceptions, receiving service from aides employed by home care providers licensed by the State of New York.[13] By reviewing and overturning the Second Circuit's erroneous ruling invalidating the rule, this Court would prevent significant disruptions to this system.

---

[13] *See* Michael S. Sparer, Medicaid and the Limits of State Health Reform 110-111 (1996)(describing New York City's efforts to channel government–funded home care services through third-party agencies).

## CONCLUSION

*Amicus* respectfully submits that petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN LONGSTRETH *
PRESTON GATES ELLIS &
ROUVELAS MEEDS LLP
1735 New York Avenue, NW
Washington, DC 20006
(202) 628-1700

*Counsel for Amicus Home Care Association of New York, Inc.*

* Counsel of Record

April 29, 2005